In the Matter of Merchant Mariner's Document No. Z-743988 and all other Licenses, Certificates and Documents

Issued to: LOUIS K. DAVIS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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LOUIS K. DAVIS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 26 April 1954 at New Orleans, Louisiana, an Examiner of the United States Coast Guard revoked Merchant Mariner's Document No. Z-743988 issued to Louis K. Davis upon finding him guilty of misconduct based upon seven specifications alleging in substance that while serving as Chief Steward on the American SS PARK BENJAMIN under authority of the document above described:

First Specification * * * on or about 4 March 1953, while ashore at Moji, Japan, he assaulted and wounded a U. S. Army soldier with a bar stool.

Second Specification * * * on or about 5 March 1953, he was absent from his vessel without leave.

Third Specification * * * on or about 6 March 1953, he was absent from his vessel without leave.

Fifth Specification * * * on or about 7 March 1953, he deserted his vessel at Shimonoseki, Japan.

Sixth Specification * * * on or about 7 March 1953, he wrongfully took important ship's records off his vessel.

Seventh Specification * * * on or about 11 March 1953, he refused to return to his vessel without justification.

Eighth Specification * * * during September, October and November 1952, while the vessel was in various Japanese ports, he wrongfully accepted money from persons furnishing the vessel with provisions.

The Fourth Specification, alleging that Appellant failed to join his vessel on 7 March 1953, was dismissed by the Examiner since it was a lesser offense included within the alternative Fifth Specification.

At the commencement of the hearing on 29 July 1953, Appellant was given a full

explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by counsel of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and each specification proffered against him with the exception of the First Specification. Appellant entered a plea of "guilty" to assault with a stool as alleged in the First Specification.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence several documentary exhibits. The Investigating Officer also made application to have depositions taken in the Far East and then rested his case pending the return of the requested depositions.

In defense, Appellant offered in evidence his sworn testimony and numerous documentary exhibits. Appellant stated that he struck the soldier with a bar stool after he had insulted Appellant, threatened to throw him out of the bar and grabbed his finger. Appellant also testified that he was in the brig for two days after the fight and then received treatment for a finger which had been fractured by the soldier. Appellant admitted taking his personal effects and ship's records ashore but he denied any intent to wrongfully remove the records. Concerning the alleged receipt of monies by him, Appellant flatly denied this and testified that the only reason he had signed a statement to this effect was because he would be placed in fear of bodily injury if he remained on the ship and refused to sign such a statement.

The Examiner then adjourned the hearing to await the taking of the depositions. Subsequently, two depositions were taken in the Far East and placed in evidence by the Examiner together with other exhibits including the General Agency Agreement under which the Arrow steamship Company acted as the General Agent of the United States.

The hearing was completed by correspondence with the Appellant and Investigating officer. After both parties had rested their case and waived the right to submit argument or proposed findings and conclusions, the Examiner delivered his decision to Appellant by registered mail. The Examiner concluded that the charge had been proved by plea to the above allegations in the First Specification and by proof of the other six specifications. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-743988 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken by counsel acting on behalf of Appellant. It is urged that:

POINT I. The Coast Guard lacks jurisdiction over the subject matter of the First Specification.

A. The First Specification. Since the incident occurred ashore and neither the safety of the vessel nor her personnel was involved, there was no "misconduct" within the meaning of R. S. 4450 and 46 C.F.R. 137.01-5. For the same reasons, this was not within the scope of assaults provided for in 46 U.S.C. 701 (paragraph 6) and 18 U.S.C. 2196.

B. The Eighth Specification. Appellant was not an "employee of, or person acting

for or on behalf of the United States" so as to constitute an offense under 18 U.S.C. 202 for receiving money with the intent to be influenced thereby. The case cited by the Examiner (Cosmopolitan Shipping Co. v. McAllister (1949), 337 U.S. 783) is distinguishable from the instant case because the former involved a claim under the Jones Act for injuries to a seaman while the latter pertains to a victualing function which was one of the duties of the General Agent. The Shipping Articles in this case did not expressly state that the crew was employed by the United States as did the Shipping Articles in the above cited case. United States v. Furer (D.C.S.D. Calif., 1942), 47 F. Supp. 402, supports the proposition that if the United States was not defrauded (and the Examiner herein so found), then there was no criminal offense.

POINT II. The evidence does not support the Examiner's findings.

A. The First Specification. The Examiner should not have accepted Appellant's plea of guilty. The provocation caused by the soldier's insulting remarks about Appellant and his race should be considered in mitigation.

B. The Second, Third, Fifth and Seventh Specifications. The Examiner acted arbitrarily by concluding that these specifications were proved on the basis that they resulted from his own act of misconduct as alleged in the First Specification. The $600 advance to Appellant negatives the conclusion that he was a deserter whose wages were subject to forfeiture. A seaman arrested and imprisoned in a foreign port is not a deserter unless there was an intention when the seaman went ashore not to return to the ship. Appellant was unable to return to the ship due to medical treatment and physical confinement but he had no intention not to return to the service of the ship.

C. The Sixth Specification. Appellant took copies of inventory rough notes off the ship and, upon request by the Master, Appellant returned the records on 10 March 1953.

D. The Eighth Specification. Appellant denied under oath that he received any money from Japanese merchants. The unsworn statement given to the N.S.A. representative is explained by the circumstances aboard ship which made Appellant fearful of bodily harm. The deposition of Mr. S. Ogata shown that was upon the request of the N.S.A. representative that Mr. Ogata originally executed a sworn statement regarding the payment of commissions to Appellant.

POINT III.The Examiner's decision is erroneous in law. For the above stated reasons and also because the Examiner failed to consider factors of mitigation such as Appellant's prior clear record, the decision is

erroneous. Since the order of revocation was imposed for all of the seven specifications, it cannot stand if the conclusion with respect to any one or more of the specifications is reversed.

CONCLUSION. For all of the foregoing reasons, it is respectfully submitted that the decision must be reversed, the order reduced, or the case remanded for further hearing on the issues of jurisdiction,mitigation and all other matters requiring the taking of evidence thereon.

APPEARANCES: Messrs. Gladstein, Andersen and Leonard of San Francisco,California, by Rubin Tepper, Esquire, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

From 2 September 1952 until 7 March 1953, Appellant was serving as Chief Steward on board the American SS PARK BENJAMIN and acting under authority of his Merchant Mariner's No. Z-743988 while the ship was on a foreign voyage.

The Arrow Steamship Company was acting as the General Agent of the United States acting through the Director, National Shipping Authority of the Maritime Administration, Department of Commerce. The General Agency Agreement provided, in part, that the General Agent should equip, victual, supply and arrange for the repair of the vessel; that the United States advance funds for all

stores and supplies; that the Master be an employee of the United States and exercise full authority with respect to the manning, navigation and management of the vessel; that the members of the crew be subject only to the orders of the Master; and that the crew be paid with funds provided by the United States.

On seven different occasions during September, October and November 1952, Appellant requested and received commissions totaling 229, 800 yen (approximately $640) from Mr. S. Ogata, a ship chandler in Japan who furnished the PARK BENJAMIN with provisions on this voyage. On 12 February 1953, Appellant signed a statement admitting that he had accepted such commissions and split them with the Master; but on 8 May 1953, Appellant denied the veracity of his previously signed statement and stated that he had signed it because he was afraid to sail with the ship unless he gave such a statement to the National Shipping Authority representative in the Far East.

On the night of 4 March 1953, Appellant, who is a negro, was at a bar in Moji, Japan, with a female companion when two U. S. Army soldiers entered the bar at approximately 2300. Both of the soldiers were in a drunken condition and when they were told that the bar was closed, they stated that they would leave when Appellant did. An argument followed between Appellant and the two soldiers. Appellant picked up a wooden bar stool and walked over to the table where the soldiers were sitting. When one of the soldiers made insulting and derogatory remarks about the negro race, Appellant struck the soldier on the head with the stool. The soldier received head lacerations for which eight stitches were required and Appellant's fourth finger on his left hand was fractured in the scuffle. Appellant was taken into custody by the U. S. Army authorities.

Appellant remained in custody until the morning of 6 March 1953 when he was released because of insufficient evidence to charge him with aggravated assault for the incident on 4 March. After his release, Appellant was examined by a U. S. Army doctor who referred Appellant to a U. S. Army hospital for treatment of his finger. Although Appellant was declared fit for sea duty on 7 March, he took all his personal belongings off the ship on this day and went ashore with the intention of remaining ashore for further medical treatment. Appellant also took ashore the ship's records of provisions received during the voyage. Appellant did not intend to return these records to the ship until after he had returned to the United States by some other means of transportation.

On 10 March 1953, Appellant's finger was again examined by a U. S. Army doctor and Appellant was again found to be fit for sea duty. Also, on this date, the Master located Appellant while ashore and told him to return to the ship with the records which he had removed without authority. Appellant took the records back to the ship but he refused to stay on board.

At about 1700 on 11 March 1953, Appellant was again taken into custody by the U. S. Army authorities as a result of additional investigation concerning the incident on 4 March. Appellant was confined in an Army stockade until he was tried, on 16 March 1953, by a Special Court-Martial on a charge of aggravated assault in violation of Article 128 of the Uniform Code of Military Justice. On his plea of "not guilty," Appellant was found "guilty" of committing an assault upon a U.S. Army soldier by cutting him on the head on 4 March 1953. Appellant was sentenced to a fine of $500 and confinement at hard labor for 6 months or until the payment of the fine. The sentence was

approved on 18 March. Appellant remained in confinement until he was advanced $600 against his earned wages and paid the $500 fine. The sentence was approved on 18 March. Appellant remained in confinement until he was advanced $600 against his earned wages and paid the $500 fine on 14 May 1953. Appellant was later repatriated to the United States.

There is no record of prior disciplinary action having been taken against Appellant by the United States Coast Guard.

OPINION

POINT I

The Coast Guard had jurisdiction with respect to the First Specification because the incident occurred while Appellant was signed on the Shipping Articles of the PARK BENJAMIN and, therefore, he was acting under the authority of his document. This was sufficient to meet the jurisdictional requirements of R. S. 4450, as amended (46 U. S. C. 239), whether the "misconduct" took place ashore or on board the ship. When a person is charged with "misconduct" under R. S. 4450, the determination as to what constitutes acts of "misconduct" is not limited to statutory violations such as those which are provided for in 46 U. S. C. (paragraph 6) and 18 U.S.C. 2196. In these administrative disciplinary proceedings, the general definition of "misconduct" is applicable since that is the only criterion set forth in 46 U.S.C. 239 for such offenses.

Concerning the question of jurisdiction as to the Eighth Specification, it is again evident that the acceptance of money by Appellant from a ship chandler was an act of "misconduct" regardless of whether there was a violation of U.S.C. 202 which only applies to persons who are employees of or acting on behalf of the United States. Obviously, a ship chandler would not hand out money freely to a ship's Chief Steward without a reasonable expectation that the decision as to the source of future provisions for the ship would be influenced; and such a decision, when influenced by the pecuniary compensation of one person, would very likely result in some detriment to the interests of whoever ultimately paid for the provisions. In addition, the terms of the General Agency Agreement show that Appellant was an employee of the United States since he was to be paid out of funds of the United States and that the United States agreed to advance funds to pay for all stores and supplies used on the ship. Therefore, Appellant was acting on behalf of the United States, if he was not acting as an employee of the United States, with respect to the victualing function which was one of the functions of the Arrow Steamship Company by the terms of the General Agency Agreement. Since this is not a criminal prosecution, the cited case of United States v. Furer, supra, is not point. Appellant's acts are considered to have been "misconduct" within the meaning of 46 U.S.C. 239.

POINT II
The First Specification.

Although the Examiner did not change Appellant's plea of guilty to assault with a stool, the Examiner inquired into the merits of the allegations and set forth his reasoning quite extensively in

his decision.

I concur with the conclusion of the Examiner. The following statement is contained in 5 Corpus Juris 644 and it is supported by numerous footnote citations including Federal court decisions and decisions in the courts of thirty-one states:

> "No provocative acts, conduct, former insults, threats, or words, if unaccompanied by any overt act of hostility, will justify an assault [or battery], no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate."

The case of Rohrback v. Pullman's Palace Car Co. (C.C.E.D.Pa., 1909), 166 Fed. 797, is directly in point. A negro railroad ported assaulted a passenger after he had subjected the porter to "gross and brutal insult." The court stated, at page 799:

> "There is no question but that the law will not permit a person, however great the provocation, to take the law in his own hands and inflict punishment by assaulting a person who may insult him. The porter, under the circumstances, could have been indicted for assault and battery, or a suit in damages could have been instituted against him, and it would it would have been no answer in law the he had been insulted. The question of provocation may be taken into consideration in the one case in imposing the sentence, and in the latter case, by the jury in awarding damages, but would be no defense to either an indictment or a suit for damages that the assault was induced by the insulting remarks of the plaintiff."

The Second, Third, Fifth and Seventh Specifications.

Appellant's absence from the vessel on 5 and 6 March 1953 was due to the facts that he was held in custody until the morning of 6 March as the result of his conduct on the night of 4 March and that he then received medical treatment for his finger before returning to the on 6 March. Since these absences were due to Appellant's misconduct on 4 March, the Examiner was correct in concluding that the Second and Third Specifications were proved.

Regarding the Fifth Specification, Appellant's intent to desert the ship is supplied by his own testimony wherein he stated that he packed his bag and left the ship with the expectation of reaching the United States before the arrival of his ship. R. 12, 13, 20. This was a clear, unequivocal admission by Appellant which referred to his intent at a time after he had been declared fit for sea duty. Therefore, there was no reasonable cause for him to leave the ship. In my opinion, this evidence far out-weighs the significance which should be attached to the authorization for the

advancement of funds to Appellant since the originator of the authorization had no idea as to what Appellant's intentions were; and the intent to permanently leave the ship is the controlling element in determining whether the offense of desertion has been proved. This case differs from those in which a seaman leaves the ship without the necessary intent and then is forced to miss the ship by reason of his imprisonment. It is also significant that Appellant's intent was formulated prior to the second time he was taken into custody by the U. S. Army authorities. It is doubtful whether Appellant would have been detained and tried in Japan if he had remained on the ship.

The allegations contained in the Seventh Specification are supported by Appellant's refusal to remain on the ship when he returned the ship's records on 10 March. Proof of this specification also supports Appellant's admission that he did not intend to complete the voyage on his ship.

The Sixth Specification.

Concerning the taking of the ship's records ashore on 7 March, it is sufficient to state that the offense was consummated on 7 March regardless of the fact that Appellant returned the records to the ship three days later.

The Eighth Specification.

The Examiner specifically stated that he did not believe Appellant's testimony denying that he had received commissions from Mr. S. Ogata, a ship chandler in Japan. The Examiner, as the trier of the facts who saw and heard Appellant testify, was in the best position to judge the credibility of the witness. Instead of accepting Appellant's testimony on this point, the Examiner accepted as the truth the statements in Mr. Ogata's deposition wherein he stated that he had paid 229,800 yen to Appellant. This is corroborated by Appellant's prior admissions to the N.S.A. Far East representative. It is not clear to me what circumstances on board the ship would produce a safer atmosphere for Appellant if he made a false statement about having received commissions from Mr. Ogata; or what derogatory significance is attempted to be attached to the statement by Mr. Ogata that he had executed a statement about the commissions at the request of the N.S.A. representative in the Far East. The only impression this admission by Mr. Ogata creates with me is that he did not take the action on his own initiative because he might contribute to his own loss of business as well as cause trouble for Appellant. This does not dictate against the veracity of the statement.

POINT III and CONCLUSION

The Examiner's decision is considered to be legally correct. In view of the numerous offenses involved and the very serious nature of some of them, it is my opinion that the order of revocation is not excessive and it will be sustained despite Appellant's prior clear record. No apparent purpose would be served by remanding the case for further proceedings to take evidence on the various issues mentioned by Appellant.

ORDER

The order of the Examiner dated on 26 April 1954 at New Orleans, Louisiana, is AFFIRMED.

A. C. Richmond
Vice Admiral, U. S. Coast Guard
Commandant

Dated at Washington, D. C., this 7th day of April, 1955.